CONTENTS.

	Page.
STATEMENT	1
ARGUMENT	4
I. THE CHARGE OF TWENTY-FIVE CENTS OVER THE BLANKET RATE AGAINST BUFFALO SHIPPERS IS SO EXCESSIVE AS TO HAVE THE SOUND OF AN UNDUE PREJUDICE AND IF THE REPORT CONTAINS ANY EVIDENCE TO SUPPORT THE ORDER, THIS COURT WILL AFFIRM THE DECREE	4
Section 3 (24 Stat. 379, 380)	4
Section 15, as amended (36 Stat. 539, 551)	5
Seaboard Air Line Railway Co. v. *United States*, 254 U. S. 57, 62	8
Houston & Texas Railway Co. v. *United States*, 234 U. S. 342, 356	9
Texas & Pacific Railway Co. v. *Interstate Commerce Commission*, 162 U. S. 197, 220	10
Pennsylvania Co. v. *United States*, 236 U. S. 351	10
Interstate Commeece Commission v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 170	10
United States v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314, 320	10
O'Keefe, Receiver, v. *United States*, 240 U. S. 294, 302	12
Philadelphia & Reading Railway Co. v. *United States*, 240 U. S. 334, 340	12
Central Railroad Company of New Jersey v. *United States*, 257 U. S. 247	12, 13
II. THE ASSERTED IMPAIRED FINANCIAL CONDITION OF THE WYOMING RAILWAY COMPANY SHOULD NOT OVERTHROW THE ORDER OF THE COMMISSION	14
St. Louis Southwestern Ry. Co. v. *United States*, 245 U. S. 136, 144, 145	14, 15
Regan v. *Farmers Loan & Trust Co.*, 154 U. S. 362, 412	15
Covington, etc. Turnpike Co. v. *Sandford*, 164 U. S. 578, 596	16
Interstate Commerce Commission v. *Union Pacific R. R. Co.*, 222 U. S. 541, 549	17
CONCLUSION	18

CASES CITED.

	Page.
Central Railroad Company of New Jersey v. *United States*, 257 U. S. 247.	12, 13
Covington, etc., Turnpike Co. v. *Sandford*, 164 U. S. 578, 596.....	16
Houston & Texas Railway Co. v. *United States*, 234 U. S. 342, 356..	9
Interstate Commerce Commission v. *Union Pacific R. R. Co.*, 222 U. S. 541, 549.....	17
Interstate Commerce Commission v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 170.....	10
O'Keefe, Receiver, v. *United States*, 240 U. S. 294. 302.....	12
Pennsylvania Co. v. *United States*, 236 U. S. 351.....	10
Philadelphia & Reading Railway Co. v. *United States*, 240 U. S. 334, 340.....	12
Regan v. *Farmers Loan & Trust Co.*, 154 U. S. 362, 412.....	15
St. Louis Southwestern Ry. Co. v. *United States*, 245 U. S. 136, 144, 145.....	14, 15
Seaboard Air Line Railway Co. v. *United States*, 254 U. S. 57, 62....	8
Texas & Pacific Railway Co. v. *Interstate Commerce Commission*, 162 U. S. 197, 220.....	10
United States v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314, 320.	10

STATUTES CITED.

Act to Regulate Commerce:

Section 3 (24 Stat. 379, 380)..... 4

Section 15, as amended (36 Stat. 539, 551)..... 5

In the Supreme Court of the United States

OCTOBER TERM, 1923.

WYOMING RAILWAY COMPANY, APPELLANT,
v.
THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION. } No. 38.

APPEAL FROM THE DISTRICT COURT OF6 THE UNITED STATES FOR THE DISTRICT OF WYOMING.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Appellant appealed (Tr. 27) from the final decree of the District Court (Tr. 24) which sustained the motion of the United States (Tr. 21) to dismiss the bill for want of equity. The bill was filed to enjoin the order of the Commission in *Pioneer Lumber Co.* v. *Director General, etc.*, 64 I. C. C. 485. Circuit Judge Lewis and District Judges Riner and Kennedy concurred in a short opinion. (Tr. 32.)

Chicago, Burlington & Quincy Railroad cuts across the northeastern corner of the State of Wyoming. Clearmont is a station located on that line. Projecting southwest from Clearmont for a distance of 28.6

miles to Buffalo, Wyoming, with a population of 1,800, is the line of the Wyoming Railway. Intermediate and 10 miles southwest of Clearmont is Ucross with a population of about 100.

For many years the lumber rates in the Northwest have been blanketed both as to points of origin and destination. In *North West Lumber Cases*, 14 I. C. C. 1, 23, 41, 51, decided June 2, 1908, the Commission prescribed reasonable rates to Clearmont which is embraced in the so-called blanket territory. The Wyoming Railway was organized in 1910 but construction was not completed until 1918. (Tr. 13.)

On June 25, 1918, the rate on lumber from the coast group to Clearmont was 45 cents and from the Spokane group 38 cents. From Clearmont to Buffalo the rate was 20 cents, making combinations of 65 and 58 cents, respectively. (Tr. 14.) The present coast group rate is 81.5 cents and the present Spokane rate is 72.5 cents. The factors up to Clearmont are 56.5 and 47.5 cents. (Tr. 14.) Buffalo shippers are thus required to pay a rate of 25 cents higher than the blanket rates accorded to other shippers. The Commission found (Tr. 15, 16):

> There is a divide known as Tunnel Hill about midway between Sheridan and Buffalo, and save for the more favorable freight rates to Sheridan the record indicates that Buffalo would probably receive the business of those who live south of the divide. Ulm, Wyo., is on the Burlington just west of Clearmont. Competitors of the Pioneer Lumber Company located at Ulm and Clearmont are enabled by

reason of their lower rates to secure trade which otherwise might go to Ucross. Casper, Wyo., is on the Big Horn division of the Burlington about 135 miles south of Buffalo and 75 miles south of Kaycee, and takes the blanket rate. The Buffalo Lumber Company's yard at Kaycee is not served by railroad, and is approximately halfway across country, between Buffalo and Casper. This complainant hauls its lumber from Buffalo to Kaycee by truck. Just prior to the hearing oil was discovered about 10 miles south of Kaycee, and the Buffalo Lumber Company insists that the blanket rate should be extended to Buffalo in order that it may use its yards at that point and haul lumber to Kaycee so that it may be able to compete in the oil field with its Casper competitors.

Spearfish and Deadwood, S. Dak., are located on the branch line of the Burlington that connects with the main line at Edgemont, S. Dak. Edgemont is 124.4 miles distant from Clearmont, and Spearfish and Deadwood are 130 and 107 miles distant, respectively, from Edgemont. Both Spearfish and Deadwood have the blanket rates. Birds, Colo., about 400 miles beyond Clearmont, and located upon the Great Western, an independent line 82 miles long, takes the blanket rates. Complainants contend that the fact that the defendants voluntarily apply the blanket rates to these points, and the further fact that defendants willingly maintain the extensive blanket, while refusing to extend blanket rates to points on the Wyoming result in undue prejudice.

The Commission found that the interstate rates on lumber and lumber products were not and are not unreasonable, but that "the failure of defendants to extend the blanket rate on lumber to Buffalo and Ucross on the line of the Wyoming Railway, while at the same time maintaining the blanket rates to other more distant points in the blanket territory on defendants' main and branch lines or on independent connecting lines, is and for the future will be unduly prejudicial." (Tr. 17.) The Commission entered the usual order, in the alternative, directing the trunk line carriers to cease and desist. (Tr. 17, 18.)

The bill was then filed alleging that "said report and order show on their face" that they were issued (1) without any substantial evidence, (2) without any evidence whatever, (3) in violation of the Constitution, and (4) in furtherance of a mistaken theory of the law. The rulings of the District Court in denying application for preliminary injunction, in sustaining motion of the United States to dismiss, and in entering judgment in favor of the defendants are the errors assigned (Tr. 28).

ARGUMENT.

I.

THE CHARGE OF TWENTY-FIVE CENTS OVER THE BLANKET RATE AGAINST BUFFALO SHIPPERS IS SO EXCESSIVE AS TO HAVE THE SOUND OF AN UNDUE PREJUDICE AND IF THE REPORT CONTAINS ANY EVIDENCE TO SUPPORT THE ORDER THIS COURT WILL AFFIRM THE DECREE.

Section 3 provides (24 Stat. 379, 380):

> That it shall be unlawful for any common carrier subject to the provisions of this act

> to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 15, as amended, provides (36 Stat. 539, 551):

> That whenever, after full hearing upon a complaint made as provided in section thirteen of this act, * * * (*either in extension of any pending complaint or without any complaint whatever*), the commission shall be of opinion that any individual or joint rates * * * regulations or practices whatsoever of such carrier or carriers subject to the provisions of this act are * * * *unduly preferential or prejudicial* or otherwise in violation of any of the provisions of this act, the Commission is hereby authorized and empowered to * * * make an order that the carrier or carriers shall cease and desist from such violation *to the extent to which* the Commission finds the same to exist, * * * [Italics ours.]

The report of the Commission is replete with evidence in support of its order. Thus (Tr. 16, 17):

> Since the trunk line carrier publishes the same blanket rate on lumber in carloads to destinations located over a considerable stretch of its main line and also extends that rate to

points located on its branch lines a shipper situated on an independent branch line connecting with this blanketed stretch of the main line is entitled to the blanket rate, especially where the service over the independent branch line is not in excess of the average service over the trunk line's own branches. It may be cheaper to perform a given service for equal distances to points located on a trunk line or on its branch lines than to points on an independent line. It is not cheaper for the Burlington to perform the service from Edgemont to Spearfish than for the Wyoming Company to perform the service from Clearmont to Buffalo. The mileage from Edgemont to Spearfish is over 4.5 times greater than that to Buffalo. Buffalo and Ucross are entitled to the blanket rates.

The question of divisions, and whether or not the Wyoming should receive its full local or only part thereof out of the blanket rate, is not here in issue.

There is no competition between retail lumber dealers situated at considerable distances apart in this extensive blanket territory. The inhibition of section 3 of the interstate commerce act against undue prejudice applies to localities as well as to shippers at those localities. As was said in Intermediate Rate Asso. v. Director General, 61 I. C. C. 226, at page 233, respecting competition between localities:

Thriving communities, all in the same general section of the country, striving for population, industry and business growth, may not need elaborate evidence to show that they are

entitled to relief if the rates are not properly related.

The three Judges of the District Court quickly reached the conclusion that the bill should be dismissed and in delivering the oral opinion of the court Circuit Judge Lewis said (Tr. 33):

> We are of the opinion that this court can not assume that the present blanket rates will stand if, in the prorating, they will work confiscation of the complainant's property. Counsel for the Government and counsel for the Commission have indicated several ways in which that may be avoided. If the present rates are to stand, that is, if the present blanket rates are to be applied to Buffalo and Ucross the carriers west of Billings may be required to contribute a part of their present share of those rates, and the Burlington may likewise be required to contribute a part of its share of those rates south of Billings, so as to make up to the complainant the necessary compensation for the haul from Clearmont to Ucross and Buffalo, in order that confiscation may be avoided. Again, the carriers may have the right to raise the blanket rates to the extent of equalizing them to the Ucross and Buffalo rates.
>
> We all agree that in the present status of the proceeding this court is without power to take action, that the rights of the Wyoming Railway Company under the order of the Commission have not yet been determined, and it is impossible to know whether or not the

> action of the defendants in obeying the order of the Commission will result in confiscation. We understand that the Interstate Commerce Act empowers the Commission to adjust a proportionate division of a through rate between common carriers where they are unable themselves to agree upon it. For these reasons we are of opinion that the application for a temporary injunction should now be denied.

Moreover, the Chicago, Burlington & Quincy Railroad, the main defendant, has not intervened in the proceeding, as it had the right to do, nor taken any part therein. The same is true of all of the other trunk line carriers who were defendants before the Commission.

In *Seaboard Air Line Railway Co.* v. *United States*, 254 U. S., 57, 62, commonly known as the *Richmond Switching Case*, the order of the Commission was sustained as within its authority under section 2 which was primarily directed against discrimination between shippers located in the same community. The carriers argued that the discrimination was justified because of the competition among the carriers. In rejecting the argument and sustaining the order, this Court, speaking by Mr. Justice Day, said:

> We are of opinion that the Commission was correct in regarding the service in question as a like and contemporary service rendered under substantially similar circumstances and conditions, and amply sustained as matter of

law in *Wight* v. *United States*, 167 U. S. 512, and *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144. The principle established in these cases is that the statute aims to establish equality of rights among shippers for carriage under substantially similar circumstances and conditions, and that the exigencies of competition do not justify discrimination against shippers for substantially like services.

Moreover, the determination of questions of fact is by law imposed upon the Commission, a body created by statute for the consideration of this and like matters. The findings of fact by the Commission upon such questions can be disturbed by judicial decree only in cases where their action is arbitrary or transcends the legitimate bounds of their authority. (*Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88; *Pre-cooling Case*, 232 U. S. 199; *Los Angeles Switching Case*, 234 U. S. 294, 311, 312, and cases cited; *Pennsylvania Company* v. *United States*, 236 U. S. 351, 361.)

In *Houston & Texas Railway Co.* v. *United States*, 234, U. S. 342, 356, this Court, speaking through Mr. Justice Hughes, said:

It is apparent from the legislative history of the act that the evil of discrimination was the principal thing aimed at, and there is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach. (See also *Sou. Ry. Co.* v. *United States*, 204 Fed.,

465; *Interstate Commerce Commission* v. *Louisville & N. R. R. Co.*, 118 Fed. 163.)

Section 3 forbids discrimination of any kind whatsoever.

It is within the power of the Commission to protect the consuming point from discrimination as well as the locality where the traffic originates.

In *Texas & Pacific Railway Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, 220, this Court said:

> When the section says that no locality shall be subjected to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, it does not mean that the Commission is to regard only the welfare of the locality or community where the traffic originates, or where the goods are shipped on the cars. The welfare of the locality to which the goods are sent is also, under the terms and spirit of the act, to enter into the question.

What is undue or unreasonable preference or advantage is a question not of law but of fact. (*Pennsylvania Co.* v. *United States*, 236 U. S. 351, 361; *Texas & Pacific Ry. Co.* v. *United States*, 162 U. S. 197, 219; *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 170).

The determination of this question of fact is for the Commission, and its findings are conclusive. In *United States* v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314, 320, this Court said:

> In view of the doctrine announced in *Interstate Com. Com.* v. *Illinois Central R. R.*, 215

U. S. 452; *Interstate Com. Com.* v. *Delaware, L. & W. R. R. Co.*, 220 U. S. 235; *Interstate Com. Com.* v. *Louisville & Nashville R. R.*, 227 U. S. 88, it plainly results that the court below, in substituting its judgment as to the existence of preference for that of the Commission on the ground that where there was no dispute as to the facts it had a right to do so, obviously exerted an authority not conferred upon it by the statute. It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed. (*East Tenn., etc., Ry. Co.* v. *Interstate Com. Com.*, 181 U. S. 1, 23–29.) And the amendments by which it came to pass that the findings of the Commission were made not merely *prima facie* but conclusively correct in case of judicial review, except to the extent pointed out in the *Illinois Central* and other cases, *supra*, show the progressive evolution of the legislative purpose and the inevitable conflict which exists between giving the purpose effect and upholding the view of the statute taken by the court below. It can not be otherwise, since, if the view of the statute upheld below be sustained, the Commission would become but a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action.

In *O'Keefe, Receiver,* v. *United States,* 240 U. S. 294, 302, this Court, speaking by Mr. Justice Pitney, said:

> Next it is insisted that the Commission applied erroneous principles of law, in that it excluded from consideration competitive conditions as an element in determining whether a division is just and reasonable or unlawfully discriminatory. The order is not open to this criticism. It not only takes competitive conditions into consideration, but establishes the maximum divisions for the very purpose of preventing preferences, discriminations, and rebates as methods of competition.

Philadelphia & Reading Railway Co. v. *United States,* 240 U. S. 334, 340, has no application. In that case this Court, speaking by Mr. Justice McReynolds, said:

> Undue discrimination against itself or the locality of its plant, as alleged by the cement company, was not found; the community declared to be prejudiced by established conditions had offered no complaint and was not party to the proceedings. Neither the $1.35 rate to Jersey City nor any other participated in by the Philadelphia & Reading was declared unreasonable, either in itself or in relation to others; * * *

Central Railroad Company of New Jersey v. *United States,* 257 U. S. 247, is against the appellant. In that case this Court, speaking by Mr. Justice Brandeis, said (p. 256):

> But the question presented here is whether the discrimination found can be held in law to be attributable to the appellants, * * *."

On the power of the Commission to remove discrimination and undue prejudice, in the *Central Railroad Company of New Jersey Case, supra,* this Court said (p. 259):

> It is urged that, while the undue prejudice found results directly from the individual acts of southern and midwestern carriers in granting the privilege locally, the appellants, as their partners, make the prejudice possible by becoming the instruments through which it is applied. Discrimination may, of course, be practiced by a combination of connecting carriers as well as by an individual railroad; and the Commission has ample power under Sec. 3 to remove discrimination so practiced. (See *St. Louis Southwestern Ry. Co.* v. *United States,* 245 U. S. 136, 144.) But participation merely in joint rates does not make connecting carriers partners. They can be held jointly and severally responsible for unjust discrimination only if each carrier has participated in some way in that which causes the unjust discrimination; as where a lower joint rate is given to one locality than to another similarly situated. (*Penn Refining Co.* v. *Western New York & Pennsylvania R. R. Co.,* 208 U. S. 208, 221, 222, 225. Compare *East Tennessee, Virginia & Georgia Ry. Co.* v. *Interstate Commerce Commission,* 181 U. S. 1, 18.)

II.

THE ASSERTED IMPAIRED FINANCIAL CONDITION OF THE WYOMING RAILWAY SHOULD NOT OVERTHROW THE ORDER OF THE COMMISSION.

The findings of the Commission (Tr. 15) that the Wyoming Railway incurred operating deficits in the years 1918 and 1919; for three years it has not paid interest on its bonds, never paid any dividends on its stock or salaries to its officers and directors; and is operating through a sparsely settled country with no present prospect of increasing traffic; and the repetition of those findings in the allegations of the bill (Tr. 4) do not annul the orders of the Commission.

(1) In *St. Louis Southwestern Ry. Co.* v. *United States*, 245 U. S. 136, 144, 145, this Court, speaking by Mr. Justice Brandeis, said:

> Furthermore, the order in the case at bar is not merely one to prevent discrimination. Orders to remove discrimination, as commonly framed, do not fix rates. They merely determine the relation of rates, by prohibiting the carrier from charging more for carriage to one locality than under similar conditions to another; and they usually leave the carriers free to remove the discrimination either by raising the lower rate or by lowering the higher rate or by doing both. *American Express Co.* v. *Caldwell*, 244 U. S. 617, 624.

The order in the instant case did not compel the carriers to reduce rates as they were authorized to remove the discrimination by an order drawn in the alternative, "by raising the lower rate or by lowering the higher rate, or by doing both."

(2) Alleged impaired financial condition of the Wyoming Railway will not stay the power of the Commission to direct the discontinuance of undue prejudice.

In *St. Louis Southwestern Ry. Co.* v. *United States*, 245 U. S. 136, 142, this Court, speaking by Mr. Justice Brandeis, said:

> *First.*—The carriers deny that the Commission has the power to compel them to establish through routes and joint rates. It is admitted that all the complaining carriers were interstate railroads and were engaged otherwise in interstate commerce.
>
> * * * * *
>
> The complaining carriers having engaged in this particular commerce, it is clear that Congress has power to regulate it. *Atlantic Coast Line R. R. Co.* v. *Riverside Mills*, 219 U. S. 186.

In *Regan* v. *Farmers Loan & Trust Co.*, 154 U. S. 362, 412, this Court said:

> It is unnecessary to decide, and we do not wish to be understood as laying down as an absolute rule, that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable. And yet justice demands that every one should receive some compensation for the use of his money or property, if it be possible without prejudice to the rights of

> others. There may be circumstances which would justify such a tariff; there may have been extravagance and a needless expenditure of money; there may be waste in the management of the road; enormous salaries, unjust discrimination as between individual shippers, resulting in general loss. The construction may have been at a time when material and labor were at the highest price, so that the actual cost far exceeds the present value; the road may have been unwisely built, in localities where there is no sufficient business to sustain a road. Doubtless, too, there are many other matters affecting the rights of the community in which the road is built as well as the rights of those who have built the road.

In *Covington, etc., Turnpike Co.* v. *Sandford*, 164 U. S. 578, 596, this Court said:

> * * * we could not say that the act was unconstitutional merely because the company (as was alleged and as the demurrer admitted) could not earn more than four per cent on its capital stock. It can not be said that a corporation is entitled, as of right, and without reference to the interests of the public, to realize a given per cent upon its capital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreason-

able and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. If the establishing of new lines of transportation should cause a diminution in the number of those who need to use a turnpike road, and, consequently, a diminution in the tolls collected, that is not, in itself, a sufficient reason why the corporation, operating the road, should be allowed to maintain rates that would be unjust to those who must or do use its property. The public can not properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. The legislature has the authority, in every case, where its power has not been restrained by contract, to proceed upon the ground that the public may not rightfully be required to submit to unreasonable exactions for the use of a public highway established and maintained under legislative authority. If a corporation can not maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the Constitution does not require to be remedied by imposing unjust burdens upon the public.

In *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 549, this Court said:

> Where the rates as a whole are under consideration, there is a possibility of deciding, with more or less certainty, whether the total earnings afford a reasonable return. But whether the carrier earned dividends or not sheds little light on the question as to whether

the rate on a particular article is reasonable. For, if the carrier's total income enables it to declare a dividend, that would not justify an order requiring it to haul one class of goods for nothing, or for less than a reasonable rate. On the other hand, if the carrier earned no dividend, it would not have warranted an order fixing an unreasonably high rate on such article. But the absence of direct testimony that the 50-cent rate was unreasonably high is unimportant. Neither can any specific effect be given to the statement of witnesses that the 40-cent rate was low. The reasonableness of rates can not be proved by categorical answers, like those given, where a witness may, in terms, testify that the goods were worth so much per pound, or the services worth so much a day. Too many elements are involved in fixing a rate on a particular article, over a particular road, to warrant reliance on such method of proof. The matter has to be determined by a consideration of many facts.

CONCLUSION.

The report and order of the Commission (Tr. 13, 17) are attached to the bill of complaint and made a part thereof as Exhibit A (Tr. 2). The findings of the Commission not being seriously controverted, it is respectfully submitted that the decree of the District Court was right and should be affirmed.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

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